No. 2680

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION FISH COMPANY (a corporation),
Appellant,

vs.

JOHN W. ERICKSON,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

A.

THE STATUTES OF CALIFORNIA MAKE THE CONTRACT ENFORCED BY THE LOWER COURT INVALID—NOT MERELY UNENFORCEABLE. THE ONLY QUESTION BEFORE THE COURT IS THEREFORE: CAN A STATE MAKE A MARITIME CONTRACT ENTERED INTO WITHIN IT INVALID?

This petition for a rehearing in the above entitled cause is solely concerned with the application of section 1624 of the Civil Code of the State of California to contracts executed within California. All other questions involved in the case are, by comparison, of merely

casual importance. Although their determination is a serious matter to the litigants herein yet their general effect is very limited. But it is entirely different with the treatment by the court of the above section. For upon the settlement of that question rests much of the power of the states.

The facts involved bring this out. As pleaded and as found by the lower court the facts were that in May, 1914, the respondent and the libelant entered into an oral agreement at San Francisco, California, whereby it was mutually agreed that the libelant was to proceed to Pirate Cove, Alaska, and serve the respondent as master of the schooner "Martha" for a period of not less than one year after his arrival. The libel sets up that before the one year had elapsed, the respondent without justification discharged the libelant. In the lower court it was held that the libelant was entitled to recover his wages for the entire year less such sums as he was able to earn in other employment during that period.

The defense that such a contract was invalid under section 1624 of the Civil Code of California was made in both the lower and the upper courts.

The Civil Code of California reads in part:

> "§ 1624. The following contracts are *invalid,* unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent:
>
> 1. An agreement that by its terms is not to be performed within a year from the making thereof;"

The section quoted, while unquestionably suggested by the original Statute of Frauds (29 Charles II, c. 3, par. 4), is not copied from it but is phrased in distinctly different language.

The paragraph of the original statute corresponding to the section of the California law reads:

> "*No action shall be brought* * * * (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the memorandum upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto lawfully authorized."

Thus under the statute of Charles II, it was declared that an action could not be brought, for instance, upon a two year oral contract, while in California such a contract is made invalid.

The distinction between two such statutes is clear—one referred only to the procedure while the other destroyed the validity of certain contracts made in a certain way.[1] This was early recognized.

In 1852 Jervis, C. J., discussed section 4 in the following language:

> "The statute in this part of it does not say that unless those requisites are complied with the contract shall be void, but merely that no action shall be brought upon it. * * * The fourth section

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[1]California by her statutes recognizes that section 1623 of the Civil Code has nothing to do with procedure. The Code of Civil Procedure regulates the proceedings of the state courts in cases involving contracts to continue for more than a year. C. C. P. 1973.

relates only to the procedure and not to the right and validity of the contract itself."

Leroux v. Brown, 12 C. B. 801.[2]

In the consideration of the enforcibility of oral contracts made outside the jurisdiction, the language of the Statute of Frauds applicable has been all important.

Where the statute affects the remedy by declaring that no action shall be brought upon certain oral contracts, then suit may not be brought in that jurisdiction although the contracts are absolutely valid where made.

Buhl v. Stephens et al., 84 Fed. 922.

On the other hand, if such contracts are made void in a state, contracts made in other states and valid where made, may be enforced in the first state although if made there they would have been void.

Allen v. Schuchard, Fed. Cases 236 (affirmed 1 Wall. 359).

These cases are merely in accordance with the general rule declaring:

"Matters bearing upon the execution, the interpretation and *the validity* of a contract are determined *by the law of the place where the contract is made.* Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility

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[2] For a recent case not involving the Statute of Frauds but dwelling on the distinction between statutes making contracts unenforcible and those making contracts invalid, see David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489.

> of evidence, statues of limitation, depend upon the law of the place where the suit is brought."
>
> *Scudder v. Union National Bank,* 91 U. S. 406, 413.

R. C. Minor, in his authoritative work on the "Conflict of Laws" has summarized the general rule in the following manner:

> "If it is alleged that the contract is void, because not in writing, it is a question of the formal validity of the contract, to be determined by the *lex loci celebrationis.*" (Section 173.)
>
> "But if by the 'proper law' of the oral contract it is provided that 'no action shall be brought' thereon unless it be in writing, while the *lex fori* does not require it to be in writing, obviously the *lex fori* does not raise any question of the impairment of the obligation of the contract. On the contrary, it enforces the obligation to a greater extent than would the 'proper law' of the contract. In this case, therefore, the matter is one pertaining to the remedy, to be controlled by the *lex fori.*" (Section 210.)

We are here then considering the effect of a state statute which makes the agreement found between respondent and appellant *invalid.* Under established principles of law it cannot be enforced in any other state whatever the laws of that state in regard to oral contracts may be. It cannot be enforced because the *lex loci contractus* determines the validity of every contract and under the provisions of the *lex loci contractus* such a contract was expressly declared invalid.

The only argument that can be made for the enforcement of the agreement found by the court below is therefore that in an action in admiralty a state

statute making a maritime contract invalid will be considered as totally ineffective by the court. This brings us to a consideration of the extent of the power of the admiralty over maritime contracts.

B.

JURISDICTION OF ADMIRALTY OVER CONTRACTS ENTERED INTO ON LAND WAS EARLY DISPUTED. IT LATER WAS DETERMINED THAT ADMIRALTY EXERCISED CONCURRENT JURISDICTION WITH THE COMMON LAW COURTS IN THE ENFORCEMENT OF SUCH CONTRACTS.

Before examining the recent cases dealing with admiralty jurisdiction over maritime contracts it will be advisable to consider briefly the former position of such agreements.

The Constitution, article III, section 2, provides:

> "The judicial powers shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases involving ambassadors, other public ministers and consuls;—*to all cases of admiralty and maritime jurisdiction;*—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state or the citizen thereof; and foreign states, citizens or subjects.
>
> "Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over

all navigable waters and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only."

Jackson v. Steamboat Magnolia, 20 How. 280, 300.

The Acts of Congress conferring jurisdiction is therefore determinative of the power of the courts.

Congress at once gave the federal courts jurisdiction over admiralty matters and the present law (differing only slightly from the earlier statutes) reads:

"Section 24. The district court shall have original jurisdiction as follows:

"Third: Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize." (Judicial Code Act, March 3, 1910. Compare Act of Sept. 24, 1789, Ch. 20.)

A dispute arose almost immediately as to the extent of the admiralty jurisdiction. Similar controversies as to the powers of admiralty had existed in the English courts for more than a century previous and these controversies had resulted in the complete victory of the partizans of the common law over their rivals of the admiralty. It was only natural that those patriots in America who believed in the right to trial by jury as something almost sacred did not relish an advance in power of a court which sat without a jury. And while ostensibly they might wish to appear

opposed to the admiralty for other reasons, no step toward building up strong federal judicial powers appealed to the ardent states rights defenders of the period.

Those who may be termed the little admiralty advocates upon the earliest opportunity claimed that in accord with the English law of the period, with a few minor exceptions, the admiralty had no jurisdiction over maritime contracts executed on land. Their hopes were however destined for disappointment. During 1815, Mr. Justice Story, acting as circuit judge, in one of the most learned admiralty opinions ever rendered in America, held that in this country the admiralty has jurisdiction over all maritime contracts.

DeLovio v. Boit, Federal Cases, 3776.

After a most searching review of the English law of admiralty the court states:

> "On the whole, I am, without the slightest hesitation ready to pronounce, that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdictions' to the courts of the United States comprehends all maritime contracts, torts and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations), which relate to the navigation, business, or commerce of the sea." (Vol. 7 Fed. Cas. 444.)

The strength of this opinion did not, however, silence the opposition. Its doctrines were ably controverted and strenuously resisted by several of the justices of the Supreme Court, and especially by Mr Justice Johnson (see *The John B. Cole,* Fed. Cases, 16,

875). The last named justice rendering a concurring opinion in *Ramsay v. Allegre,* 12 Wheat. 611 (1827), expressed forcibly his common law attitude toward the admiralty.

The occasion for his action was as stated by him:

> "I think it high time to check this silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions." (page 614.)

Referring to the enforcement of contracts in admiralty under the English law, he declared:

> "But, right or wrong, it is not to be questioned at this day, that the admiralty have lost their jurisdiction over contracts, with the exceptions stated. The most animated advocates of admiralty do not deny this. They mourn bitterly over its fall, but uniformly acknowledge that they are eulogizing the dead." (page 621.)

But the vehemence of Mr. Justice Johnson in his denial of the powers of admiralty jurisdiction over maritime contracts were not availing. Mr. Justice Story lived to declare during 1845 in an opinion of the Supreme Court that

> "over maritime contracts the admiralty possesses a clear and established jurisdiction, capable of being enforced in *personam* as well as *in rem.*" (*Andrews v. Wall,* 3 How. 568, 572.)

See also

> *N. J. Steam Navigation Co. v. The Merchants Bank,* 6 How. 344.

The whole drift of judicial opinion was moreover toward the recognition of the theories enunciated in

DeLovio v. Boit, supra; *The John B. Cole,* Federal Cases 16,875; *Willard v. Dorr,* Federal Cases 17,679; *Gloucester Ins. Co. v. Younger,* Federal Cases 5,487. While every advance in the admiralty jurisdiction was fought by the judges believing strongly in the common law, after 1845 there was no longer any question of the jurisdiction of admiralty in *personam* over maritime contracts wherever made.

The attitude of the common law and admiralty courts in matters where they both had jurisdiction was at first a troublesome question. By 1858, however, this doubt was settled.

> "The relation of the District Courts, as courts of admiralty, is defined with exactness and precision by Justice Story in his Commentaries on the Constitution. He says: 'Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of common law and admiralty are concurrent (as in cases of possessory suits, mariners' wages and marine torts), there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. The reasonable interpretation,' continues the commentator, 'would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was

> concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. *This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law jurisdiction.'* 3 Story's Com. sec. 1666, note."
>
> *Taylor v. Carryl,* 20 Howard 583 at 598.

At the outbreak of the Civil War the jurisdiction of the admiralty over all maritime contracts was established and the concurrent jurisdiction of the common law courts was equally well settled. But for the purposes of this petition it must be remembered that it was only after a long controversy that the jurisdiction of admiralty over maritime contracts was allowed. And any claim that such jurisdiction has always been acknowledged in the United States is without foundation.

C.

THE WORKMAN CASE, 179 U. S. 552, WAS NOT A REVOLUTIONARY DECISION. IT MERELY APPLIED WELL SETTLED PRINCIPLES AND HELD THAT IN ADMIRALTY AS IN EQUITY THE FEDERAL COURTS WILL NOT BE BOUND BY DECISIONS OF STATE COURTS.

The lower court disposed of the application to the contract of section 1624 of the California Civil Code with the mere statement:

> "In a suit in admiralty involving a contract so purely maritime as the hiring of the master of a vessel the court will not be bound by the Statutes of Fraud or of limitations of individual states."[3]

The court very evidently had in mind not the California act directed against oral contracts but the original statute of Charles II. As heretofore pointed out, the statute of Charles II merely related to the procedure and not to the right and validity of the contract itself. Since manifestly a state cannot control the procedure of a federal court, had the statute been in the words of the original act, the court of admiralty might consider oral contracts as though there were no Statute of Frauds anywhere. This is a useless discussion since the California statute does not concern the remedy but altogether invalidates the contract.

The Circuit Court of Appeals, however, in effect took up the real question—what if the state did declare the contract invalid, as a maritime contract, is it not valid in admiralty irrespective of any action by the state?

This court, in giving its reason for holding the contract valid although it had been made invalid by the statutes of the state, said:

> "In the case of Workman v. New York City, Mayor, etc., 179 U. S. 552, 560, the court (four of the justices dissenting) distinctly adjudged that

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[3] The language used by the lower court is slightly confusing. The admiralty court assuredly either must refuse to recognize the Statute of Frauds or else always be bound by it. For the court to have power to declare the contract of one man valid and to hold an identical contract made under similar circumstances void, would reduce justice to mere mockery. It is not like a Statute of Limitations in being adapted to partial enforcement.

> neither the local law nor any of the decisions of a state can deprive one of the right to relief 'in a case where redress is afforded by the maritime law and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.' "

Before entering into a consideration of the Workman case supra it is necessary to note that we have been unable to locate any decision in which the validity of an oral maritime contract to continue for more than a year has ever been upheld. Presumably, although it is open to argument, the Statute of Frauds after its enactment by Parliament was not adopted by admiralty courts as a rule of decision. Before California enacted the above section (C. C. §1624) and had no statute on the subject, an oral contract of such a nature might have been enforced in admiralty. This is important because it results in the holding of this court not that the California statute will be disregarded because it took away a right of long standing—but that it will be disregarded because it seeks to take from parties making contracts a right which the court adjudges they would have had if there had been no statute. In other words, if a state statute results in an attempted change of a personal right under a maritime contract, that statute will be disregarded in admiralty.

The Workman case, supra, had under consideration the question of the liability of a city for injury to a vessel by a fireboat owned by the city and in the custody and management of its fire department. The collision was caused by the negligent handling of the fireboat while hastening to assist in putting out a

fire raging at the head of a dock. The district court, on the assumption that the local law controlled, determined that by that law, as declared by decisions of the courts of the State of New York, the city was liable for the injury caused by the negligent management of its fireboat (63 Fed 298). The decision of the lower court was reversed by the Circuit Court of Appeals (67 Fed. 347) and the case came before the Supreme Court on a writ of certiorari. By a bare majority the court held the city liable upon the ground that the maritime and not the local law governed the determination of the liability.

Since the rendering of the opinion extravagant claims have been made by certain advocates as to the extent to which the decision went. A careful study of the opinion will show that these claims are totally unjustified and that no overwhelming step toward depriving states of power was taken by the court.

It must primarily be carried in mind that the action involved a tort and not a contract, and that the state "law" overridden was simply the common law principles laid down in the state courts. And as before stated, so close were the state court decisions that Brown, D. J., certainly a most able judge, held that under them the city was liable.

The limited extent of the decision is shown clearly by the much quoted statement in the opinion:

> "The decisions of this court overthrow the assumption that the local law or decisions of a state can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action

maritime in its nature and depending in a court of admiralty of the United States." (page 560.)

Admittedly no state statute can regulate the jurisdiction or practice of the United States courts (*The Lottawanna,* 21 Wall. 558).[4] For instance, the federal courts in admiralty are not governed by the state Statutes of Limitation *(The Key City,* 14 Wall. 653).[5] A state

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[4]The attitude of the courts toward encroachment on federal equity jurisdiction has been as marked as their holdings as to the invalidity of the federal admiralty jurisdiction.

> "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states, cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' Hyde v. Stone, 20 How. 175; Suydam v. Broadnax, 14 Pet. 67; Union Bank v. Jolly's Administratrix, 18 How. 503. If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation and is uniform throughout the different states of the Union."
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> Payne v. Hook, 7 Wall. 425, 430.

This is exactly the same position that has been taken toward admiralty.

> "As the constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures."
>
> Butler v. Boston and S. S.S. Co., 130 U. S. 527, 557.

[5]The federal courts in admiralty and in equity have the same attitude toward limitations statutes. Referring to maritime liens the Supreme Court declared in The Steamboat Key City:

> "While the courts of admiralty are not governed in such cases by any Statute of Limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense."
>
> The Steamboat Key City, 14 Wall. 653, 660.
>
> "In equity cases the federal courts are not bound by the Statute of Limitations. In those courts the question of laches is paramount, though they will act, or refuse to act, in analogy to such statute."
>
> Sullivan v. Ellis, 219 Fed. 694, 698 (C. C. A. 8th Cir. 1915).

cannot affect the application of the Limited Liability Act in admiralty (*Butler v. Boston and S. S.S. Co.*, 130 U. S. 527).[6] Contributory negligence does not wholly bar recovery in admiralty (*The SS. "Max Morris"*, 137 U. S. 1).[7] In *The J. E. Rumbell* it was held merely that the admiralty court would determine the priority of maritime liens upon maritime principles (148 U. S. 1).

All these cases cited as the basis of the court's holding in the Workman decision are cases of procedure or jurisdiction. They do not pass upon the validity of any contract enforced in admiralty but are only concerned with the powers of the states to regulate the admiralty courts. Naturally the states have no such power or the federal jurisdiction in admiralty would be carried on subject to the approval of the states.

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[6]As pointed out in The Lottawanna, 21 Wall. 558, the constitutionality of the Limited Liability Act was sustained not as within the power of congress under the admiralty clause but as being within the commerce clause. Indeed the decision in which the validity of the statute was upheld declared:

> "There is not here as in Allen v. Newberry, 21 How. 244, a question of admiralty jurisdiction under the law of 1845 (5 Stat. at p. 726), but of the power of Congress over the commerce of the United States."
>
> Lord v. S.S. Co., 102 U. S. 541, 545.

As a valid act under the commerce clause no state legislation could limit its operation. This is equally true of any valid federal act which regulates commerce such as the Federal Employers Liability Act of April 22, 1908. Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 501.

[7]"In the absence of statutory regulation, the fellow servant rule and its interpretation becomes a matter of general law as to which the federal courts apply their own rules of decision; and the status of Wallace as to being a vice principal or a mere fellow servant is to be determined in this case by the decisions of the federal courts rather than those of Mississippi B. & O. R. R. Co. v. Baugh, 149 U. S. 368."

Moss. v. Gulf Compress Co., 202 Fed. 657, 661 (C. C. A. 5th Cir. 1913).

The only case cited by the court in support of the above quotation and which seems to affect the court in admiralty in considering a matter of right as distinguished from jurisdiction or procedure is *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 443. Here the validity of a contract was under consideration.

The court said in part:

> "It was argued for the appellant that the law of New York, the *lex loci contractus,* was settled by recent decisions of the Court of Appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence." (Cases cited.)
>
> "But on this subject as in any question depending upon mercantile law and *not upon local statute or usage,* it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. (Cases cited.) The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States."

This rule that the federal courts are not bound by decisions of state courts upon questions of general jurisprudence or general commercial law has always been recognized (*11 Cyc.*, 901). As stated in the quotation above, this rule only applies to state court deci-

sions and does not apply to statutes. But if a state legislates regarding a matter of general commercial law the federal courts necessarily are bound by the statute enacted.[8]

When, therefore, we examine the principles of the Workman case in the light of the decisions upon which it rests, we find no extreme holding—no seizure of power by an admirer of the admiralty jurisdiction. It is simply what Mr. Justice White declares it to be: a mere application of well recognized rules. And these rules are that no state by statute or otherwise can infringe upon the jurisdiction or the procedure of admiralty—and that in cases of maritime law the admiralty courts will not be bound by the decisions of the state courts. It is true that this opinion like many others contains certain expressions which if torn from the context seem almost revolutionary. But when viewed as they lie embedded in the decision it is seen that their radical aspects have been a pure illusion.

In the consideration of the facts here involved the Workman case gives us no assistance. We are not considering a problem of procedure or of jurisdiction.

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[8]The effect of state statutes is particularly well brought out by the courts in their consideration of negotiable instruments.

> "The notes are undoubtedly Kansas contracts; and while we are not bound to follow the view expressed by the highest tribunal of the state upon general principles of the common law merchant (Oats v. National Bank, 100 U. S. 239; R. R. Co. v. National Bank, 102 U. S. 14; Dygert v. Vermont Loan & Trust Co., 94 Fed. 913; Northern Nat. Bank v. Hoopes, 98 Fed. 935; Phipps v. Harding, 70 Fed. 471). **When, however, a state has adopted a negotiable instrument law by statute, we must give force and effect to such law in all cases where the same is applicable.**"
>
> Smith v. Nelson Land & Cattle Co., 212 Fed. 56, 59.

No conflict of decisions between the admiralty and the state courts is sought to be reconciled.

There is one question before the court and only one:

Is a state powerless to declare invalid contracts executed within it when those contracts are maritime in their nature?

D.

CONTRARY TO THE PLAIN MEANING OF THE WORDS OF THE CONSTITUTION AND TO THE OPINIONS OF THE COURTS IT IS PROPOSED TO THROW THE MARITIME LAW IN THIS COUNTRY INTO UTTER CHAOS BY HOLDING THAT CONGRESS HAS EXCLUSIVE AND ENTIRE RIGHT TO REGULATE MARITIME CONTRACTS.

Unfortified by the Workman case or by any other case, with its face set not only against the plain meaning of the words of the constitution but against the whole drift of judicial opinion as indicated by the decisions of the Supreme Court since 1789, it is now proposed that this court hold that states have no power over maritime contracts and by so doing attempt to plant federal sovereignty over a new domain and to seize from the states a power heretofore unquestioned. By making this holding the court will in effect read into section 8, article I of the Constitution the words: "The Congress shall have power * * * to regulate maritime contracts." But the court will be going even farther than this. In the construction of the powers granted to Congress in the above section,

it has been held that where state statutes affecting interstate commerce are local in their nature and where Congress has not acted, the statutes are valid. But to sustain the libelant's contention in the present case the court must hold that all state statutes invalidating maritime contracts are void—regardless of whether or not Congress has legislated on the subject.

If states have no power to declare maritime contracts invalid it is evident that they have no power to regulate them. For regulation by its very meaning in prescribing one form of contract makes unlawful contracts not made in conformity with law. By announcing the powerlessness of the states to regulate maritime contracts, the court is in effect declaring unconstitutional all state statutes regulating such contracts. For an unconstitutional law is merely one of no force and effect and this is exactly what a state statute will be if the admiralty declines to recognize its validity.

Such power in the federal government has been heretofore completely unsuspected. Since the earliest times states have enacted laws maritime in their nature. Hundreds of statutes have been passed dealing with charters, contracts of affreightment, pilotage agreements, marine insurance policies, etc. No one has ever questioned the power of the state to pass such laws. Whole chapters of the Civil Code of California are devoted to the regulation of maritime contracts. The state and federal courts in common law and equity

and admiralty have applied the statutes without one suggestion that they were invalid.[9]

When Congress regulated maritime matters, its power so to do was carefully sustained by the Supreme Court as an exercise of its authority under the commerce clause.[10] That court again and again was declared in admiralty as in equity that no state had power to infringe upon the jurisdiction of the federal court. But no implication was ever made that under the judicial section of the Constitution, power to regulate a right, power to regulate maritime contracts was taken from the states. The court might equally well hold that under the judicial section all power to regulate contracts between citizens of different states was

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[9]Quite the reverse in the case of The Hamilton, the Supreme Court squarely held that in the admiralty a state statute conveying a right would be enforced.

> "We pass to the other branch of the first question,—whether the state law, being valid, will be applied in admiralty. Being valid, it created an obligation—a personal liability of the owner of the Hamilton to the claimants. (Slater v. Mexican R. R. Co., 194 U. S. 120, 126.) This, of course, the admiralty would not disregard but would respect the right when brought before it in any legitimate way. Ex parte McNeil, 13 Wall. 236, 243."
>
> The Hamilton, 207 U. S. 398, 405.

This case is simply in accord with the decisions holding that a state statute giving a right clearly within admiralty jurisdiction will be enforced in admiralty. Instances of such rights created by states are the statutes giving rights arising out of death by wrongful act. See The Harrisburg, 119 U. S. 199. So also with state statutes creating liens for supplies furnished domestic vessels (Rodd v. Heartt, 21 Wall. 558). Similarly a state statute giving a new equitable remedy will be enforced in the federal courts in equity (Reynolds v. Crawfordsville Bank, 112 U. S. 405).

> [10]"The scope of the maritime law, and that of commercial regulation is not coterminous, it is true, but the latter embraces much the largest portion of the ground covered by the former. Under it Congress has regulated the registry, enrollment, license and nationality of ships and vessels; the mode of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime." (The Lottawanna, 21 Wall. 558, 577.)

removed from the individual states and conferred upon the federal government alone.[11]

Suddenly this court has held that a state has no power to declare a maritime contract invalid. The invalidity of hundreds of statutes is patent. The law of ships, of marine insurance, of stevedoring and all other maritime subjects is thrown into utter confusion. And the admiralty is granted powers which even its most ardent advocates had not dared to hope for.[12]

Rarely does a case present a pure problem of law as does the action now under consideration. The question of law stands out completely stripped of all questions of fact. In the future the decision rendered or to be rendered by this court cannot be distinguished by any allusions to the facts. The facts are not

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[11]As has been pointed out in the foot notes the courts have gone no further in making clear the inviolability of admiralty than they have of federal equity jurisdiction. Yet courts of equity constantly enforce state Statutes of Frauds. See such cases as Kennedy v. Bates, 142 Fed. 51; Horton v. Stegmeyer, 175 Fed. 756; Ducie v. Ford, 138 U. S. 587. Can any one imagine the claim that state statutes making contracts invalid need not be considered by the federal courts sitting in equity.

[12]To take away the power of a state to regulate maritime contracts seems a clear denial of the principle stated by the Supreme Court in enforcing in admiralty a state pilotage statute:

> "It is urged further that a state law could not give jurisdiction to the District Court. That is true. A state law cannot give jurisdiction to any federal court, but that is not a question in this case. A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in a proper federal tribunal whether it be a court of equity, of admiralty or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality."
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> Ex parte McNeil, 13 Wall. 236, 243.

involved. For that reason the opinion is almost certain to become a leading case. If the decision of the lower court stands, then states have practically no power over maritime contracts. The former functions of the state will be henceforth regulated solely by the federal government. A great step will have been taken in tearing down the power of the state and in building up that of the nation.

Whether or not the law is to become thoroughly hostile to the theories of the state once acknowledged in this country we do not know. But we are absolutely confident that before determining that the power of the federal government is so great and that of the state so limited, it will be well for the future of American jurisprudence, that further consideration be given to the advisability of such a revolutionary change in the constitutional law of the United States.

For this reason we respectfully request that a rehearing of the case be had and that the effect and the wisdom of the decision upon our law be more fully argued before this court.

Dated, San Francisco,
September 11, 1916.

H. W. Hutton,
Proctor for Appellant and Petitioner.

Thomas A. Thacher,
Denman and Arnold,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

THOMAS A. THACHER,
Of Counsel for Appellant and Petitioner.